

# Constitutional Improvisation and Executive Omnipotence: the Cypriot Handling of the Pandemic

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2021-03-02T09:00:02

## 1. A Year in Review: Overview of Legal and Political Response and Adaptation to COVID-19

The outbreak of COVID-19 caught the Cypriot legal order unprepared as regards the effective response in containing the spread of the virus. Contrary to the approach of other European states that declared a state of emergency, Cyprus opted for the adoption of executive measures based on pre-existing, primary legislation (for an analysis of the non-proclamation of emergency in Cyprus as a response to COVID-19, see [here](#)). In the absence of any contemporary legislation and with the conscious decision not to table legislation, the executive employed the provisions of colonial legislation, namely the Quarantine Law (Cap. 260) which was enacted in 1932 by the British. The said law intended to regulate the imposition of quarantine and provided for the prevention in the then colony of dangerous infectious diseases (the original Quarantine Law, without any subsequent amendments, is available in English, [here](#)). Following the independence of Cyprus in 1960, colonial legislation – including Cap. 260 – remained in effect, as per article 188 of the [Cypriot Constitution](#), subject to compliance with constitutional provisions.

The Quarantine Law enables the executive to declare any infectious or contagious disease as dangerous, to pronounce any local area to be an infected area, to provide quarantine stations, isolation hospitals, buildings and equipment. Most importantly, it enables the executive to adopt regulations and/or decrees imposing a wide range of restrictive measures (articles 6 and 6A). Thus, the Quarantine Law neutralizes the legislature of its legislative competences on the matter, downplays its role to that of an observer and concentrates all relevant powers to the executive. Indeed, following the appearance of the first COVID-19 cases in Cyprus, the legislature remained silent and lethargic on the issue of tackling the pandemic and implicitly accepted the competences of the executive under the said law to adopt measures. In other words, the Cypriot Parliament allowed the implementation of a colonial (and up until then idle) legislation, that fails to reflect the post-independence realities on the island, namely the establishment of a constitutional foundation and the existence of the fundamental principle of the supremacy of the Constitution. The Parliament gave a blank cheque to the executive to deal with the pandemic, without exercising any substantial legislative scrutiny or oversight since the outbreak of the disease. This continues to be the state of affairs.

## 2. The Executive and Use of Powers in Response to Emergency

In March 2020, when the number of confirmed cases was growing exponentially in Europe, and the first cases were confirmed on the island, the executive used the sole legislative basis available, the Quarantine Law, to issue decrees imposing measures with the view of preventing the spread of the virus. The navigation in uncharted territory due to the unknown nature of the virus at the time, in conjunction with the danger of collapse of the health system and the alarming number of deaths in other European states, forced the government to take drastic (but hasty) measures. Inevitably, the government had to re-adapt the measures on several occasions during the initial stages (March), with the adoption of 13 executive decrees in 20 days.

The first lockdown in Cyprus was imposed in March 2020, when the Minister of Health declared all districts as ‘infected local areas’ and issued a series of enforceable measures of high severity (see, for instance, decrees [here](#), [here](#) and [here](#)). These nationwide measures included: (a) curfews (prohibition of any movement from 9 p.m. until 6 a.m.); (b) prohibition of unnecessary movements (with exceptions of transition to and from workplaces, and for work purposes, visits to doctors, transit with the purpose to aid family members or citizens who cannot look after themselves, or who are in self-isolation or quarantine, etc.), while any exceptional movement was only permitted if the person had obtained relevant permission via text message or special forms; (c) prohibition of access to public places (e.g. parks, playgrounds, open-air sports, public gathering areas); (d) suspension of operation of public markets, bazaars, etc.; (e) prohibition of attendance to places of religious worship; (f) suspension of operations of all retailers (with exceptions); (g) closure of schools. The government further implemented an entry ban, by suspending flights to and from Cypriot airports, except for flights related to the transport of cargo, technical flights and humanitarian/ambulance/repatriation flights (see [here](#) and [here](#)). However, individuals could obtain an authorization to enter Cyprus by submitting a medical certificate from the country of origin to prove that they did not have COVID-19 and were placed in mandatory 14-day quarantine, upon arrival, at accommodation provided by the government. The measures of the first nationwide lockdown were gradually relaxed from May 2020, but numerous measures remained in force.

A new series of strict measures were imposed in October and November 2020, due to the rapid increase in COVID-19 cases. This time, and notwithstanding the adoption of nationwide measures (such as the imposition of curfews, mandatory masks even in public places), the government imposed additional targeted measures in specific districts, following the epidemiological data and the spread of the pandemic recorded locally (see [here](#), [here](#), [here](#) and [here](#)). The most restrictive and severe measures were adopted on November 12, 2020, when the ‘hotspot’ districts of Limassol and Paphos were put into an 18-day local lockdown and movement in or out of the districts (as well as cross-district travel) was prohibited (with exceptions), with the set-up of road-blocks monitored by the police, assisted by the national guard

(see [here](#)). This is a measure that can be associated with martial law. By December, even more invasive measures were enforced: mandatory use of masks in public spaces at all times, advice for online work (yet, not compulsory), closure of malls, prohibition of dining-in catering services and, most notably, ban of assemblies over two persons in private or public meeting spaces (see [here](#)).

It is worrying that many of the measures adopted by the Cypriot government in 2020 were not only unsuccessful but also challenge(d) – if not undermine(d) – the rule of law which is a cardinal principle in the Cypriot Constitution. The measures adopted by the government give rise to significant concerns relating to the principles of legality, certainty, necessity, proportionality, transparency and rationalisation.

### **3. Executive Measures and Challenges to the Rule of Law**

In terms of legality, the measures were adopted on the basis of an ambiguous and outdated colonial legislation that disregards the existence of the Constitution as the supreme source of law, as well as any contemporary understanding of human rights protection. It should be noted that, while the Parliament remained operational, the legislature failed to update and reinforce the legal framework for the adoption of measures. It only exercised legislative powers – but not substantive – on two occasions (March and June 2020). First, it amended the Quarantine Law to adjust the prescribed fines in the event of the violation of the regulations and decrees made under the said law. Second, it increased the powers of the police to oversee the implementation of and compliance with the executive decrees: it provided for *ex parte* applications by the police for the issuance of provisional court orders for the suspension of operation of a business violating the decrees; it enabled the police to enter premises, other than residences, if there is reason to believe that the measures were breached/are being breached; it enabled the Chief of Police to issue a (maximum of 5-day) prohibition notice against premises that have violated the measures; it amended the amount of extrajudicial penalty that may be imposed on persons in violation of the decrees.

Additionally, it should be noted that the executive failed to provide any sufficient justification of the measures that it imposes beyond the epidemiological statistics. Therefore, there is hindrance of the legal assessment of the rationale underlying the measures, of the way the measures are connected with the pursued aim and ultimately of their necessity and proportionality. These failures are exemplified in the text of the vast majority of promulgated decrees, that set as the pursued aim the containing of the spread of the disease and the protection of public health and prevention of the collapse of the health system by the dissemination of the virus. There is, however, no further explanation or specific evidence to support the necessity and proportionality of the measures. The executive merely states the existence of an imperative need to adopt additional measures which implies the failure of the previous sets.

In terms of certainty, precision, and transparency, the concerns are also grave due to several contributing factors. The constant promulgation of decrees (a total of 62 decrees in 2020), altering, readjusting or clarifying the measures for dealing with the pandemic and the lack of consistency of the measures, caused a feeling of uncertainty and unease to the population. Moreover, reference can be made to the lack of transparency in the decision-making process, combined with the vagueness of what the process actually is. There has been no circulation of minutes for the decision-making process and equally no knowledge of any alternative measures proposed. Important is also the absence of transparent prior consultation with stakeholders and affected groups in the design of the measures, as well as the lack of specialist supervisory bodies with powers to reflect on the process and effectiveness of the measures, as well as vis-à-vis their legal impact. Finally, one has to reject as unconstructive the plethora of non-institutional, often conflicting, public statements made by scientist advising the government and which in any case cannot be considered to form part of institutional transparency and adequate justification.

Further concerns may be noted in relation to the accessibility of the measures. On this issue, the Press and Information Office (PIO) launched a COVID-19-related website, available in Greek and English, where decrees, important announcements, information guides and press releases are uploaded (see [here](#)). The PIO has published guidelines and information flyers in different languages and dialects (Arabic, English, Russian, Persian, Somali, French, Georgian, Chinese, Turkish, Kurdish, Sinhala, Tamil, Vietnamese, Filipino, Kurmanji, Urdu, Bengali, Sorani, Romanian, Bulgarian), as well as short videos in sign language. In addition, short informative clips (funded by the government and/or the EU) feature on all broadcast media and social media. The concerns relate to the fact that not all decrees are translated in languages other than Greek, but only that are considered important, thus certain language groups may not be promptly informed of new developments. Additionally, the measure prohibiting movement, unless prior authorization was obtained via text message, was troubling for elderly people. However, it should be noted that this measure was amended, so as to enable people over 65 to use written declarations of movement by exception.

## **4. Human Rights and Civil Liberties Considerations: The Ineffectiveness of Judicial Scrutiny and Oversight**

The protection of human rights in Cyprus is safeguarded under Part II of the Constitution (articles 6-35), the *acquis communautaire*, as well as international human rights treaties (including the ECHR, ICCPR and ICESCR). In times of crisis, such as the outbreak of the pandemic, the Constitution should have been used as a shield against arbitrary human rights interventions. Unfortunately, this was not the case in the Cypriot legal order. The measures imposed by the executive inevitably interfered with numerous constitutionally-entrenched rights, such as: the right to liberty and freedom of movement with the imposition of curfews and prohibition of unnecessary movement (articles 11 and 13); the right to private life, with the requirement to obtain permission for any movement and indicating the reason of

movement (article 15); the freedom of religion by closing all places of worship or imposing limitations to the number of attendees (article 18); the right to education by moving education online, without securing the access of all students to the internet and necessary infrastructure (article 20); the right to practice your profession or to carry your business, with the closure or imposition of employee quotas present in businesses (article 25). Moreover, a particularly worrying limitation is that of the freedom of assembly (article 21), with the executive's blanket application of banning gatherings of more than two persons in private or public meeting spaces, since December 2020.

It is accepted that these constitutional provisions are not absolute and may be limited for, inter alia, purposes of public health. However, the manner and extent of intervention remains to be established. There is constitutional concern as to the use of the colonial law that predated the Constitution, especially given that a state of emergency could not be declared for public health reasons (see relevant analysis, [here](#)). This creates a paradox whereby the scrutiny level under a state of emergency would have been higher than the one currently applied. The adoption of a new law would have been preferable for purposes of democratic legitimacy and constitutional propriety.

If the legality of the decrees for articulating human rights limitations is accepted on the basis of normative intervention capacity and it is also accepted that the protection of public health is undoubtedly a legitimate aim, it does not necessarily follow that the measures are necessary, suitable and proportionate. Additionally, issues of unequal treatment, double-standards and selectiveness are also visible in the measures adopted. For instance, in December the government has imposed a curfew from 9 p.m. until 5 a.m., exempting the movement of hunters from 3 a.m., with that activity being classified as a special type of exercise. At the same time, the decree prohibited all athletic team events for persons under the age of 18, but not of persons above 18.

Special reference must be made to the decision of the government to impose a travel ban, as part of the very first set of measures imposed in Cyprus. This impacted on the absolute right enshrined in article 14 Constitution that '[n]o citizen shall be banished or excluded from the Republic under any circumstances'. This provision was at the epicentre of [Case 301/2020](#) (April 16, 2020), the only Cypriot case where the constitutionality of COVID-19 measures was challenged. In this case, the administrative court was asked, in the context of interim proceedings, to issue a judicial order suspending the decree imposing restrictions on entry to the Republic as being *ultra vires* of the enabling legislation. However, the court dismissed the claim on various procedural grounds, and further denied jurisdiction over COVID-19 measures, by considering them as coming within the scope of governmental acts (*acte de gouvernement*) which are excluded from judicial review. In this case, the administrative court departed from its previous cautious and narrow approach of the doctrine of government acts, and accepted, for the first time, that public health grounds could be included in the list of governmental acts. The decisive criterion for the Court was the severity of the situation of the pandemic and the acceptance of the expertise of the decision-maker that the Court lacked. Placing

such measures of questionable constitutionality outside the reach of judicial review, in combination with the legislature's reluctance of taking any initiatives, make the Court's decision particularly worrying. In effect, the Cypriot legal order now operates in the following framework: legislative inertia, executive omnipotence, lack of supervisory mechanisms (priori, during and after the adoption of decrees) and self-neutralised judicial scrutiny. In times of such an unprecedented crisis, when effective judicial scrutiny should have been the safety net, that net has become fictional.

## **5. 2021 Outlook: Recommendations for Governance, Democracy, Human Rights, and the Rule of Law**

In 2021 the challenges to the rule of law remain. The imposition of curfews and of a new three-week nationwide lockdown – including the prohibition of movement, the move of primary and secondary education online and the suspension of operation of all retail and department stores (with exceptions, such as food and beverage retailers, pharmacies, etc.) – have once again caused the unease, frustration and disbelief of the general population for being unreasonable (see decree [here](#)).

The Cypriot legislative, executive and judicial authorities are bound to secure, within the limits of their respective competence, the efficient application of the constitutionally envisaged human rights provisions (see article 35 of the Constitution). At the legislative level, the Parliament must not relinquish its constitutional role and must step up to produce an updated framework for dealing with the pandemic and to impose restrictions to the powers of the executive to interfere with human rights. At the judicial level, the courts must reconsider the approach of the first instance administrative court to categorize COVID-19 measures as *acte de gouvernement* and exercise intense review of the measures for the benefit of human rights, constitutionalism and the rule of law. As for the executive, it is now important to establish a special advisory committee to the Council of Ministers, comprised of experts from different fields (epidemiologists, virologists, medical doctors, legal counsels, stakeholders) for forming a holistic strategy for tackling the pandemic, as well as specialist supervisory bodies for overseeing the implementation of these measures. In times of crisis, law must remain the entrenched refuge.

